Supreme Court, U.S.
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No. 98-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARK STAFFORD ROBINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The government's brief in opposition urges the Court to decline to resolve the circuit court conflict in this case. The government has divined that the Third Circuit may reconsider its decision in light of this Court's decision in *United States v. Wells,* 519 U.S. 482 (1997). (Opp. 7) The government argues that intent to defraud the United States should be read universally to include obstruction of a government function. (Opp. 7) It argues that despite the Reviser's representation to contrary, the deletion of the term "the revenues" from § 545 evidenced a Congressional intent to change the substantive meaning of the statute from one which forbade acts designed to deprive the government of duties, to all acts which somehow would obstruct any governmental function. (Opp. 7) The government is wrong in each of these contentions.

Although *Wells* made clear that in the case of 18 U.S.C. § 1014, the amalgamation of thirteen prior provisions into one new statute, ten of which had no previous express materiality provision and three of which lost the provision in the course of the consolidation, resulted in a statute which had no materiality requirement; *Wells* does not repudiate this Court's established jurisprudence that the Reviser's Notes are critical in interpreting the 1948 Criminal Code language. The government's arguments suggest one additional reason for this Court to grant certiorari: to clarify that *Wells* does not impugn more than a score of cases in which the Court has used the Reviser's Notes from the 1948 Criminal Code Revision or the parallel Judicial Code Revision as the authoritative source to interpret the meaning of statutes.

This Court detailed the history of the 1948 revisions in *Muniz, et al. v. Hoffman, Regional Director, N.L.R.B.,* 422 U.S. 545 (1975):

> The Court's analysis in *Fourco Glass Co. v. Transmirra Corp.* 353 U.S. 222 (1957), is particularly relevant to our inquiry in this case because of the parallel courses followed by the revisions of the Criminal and Judicial Codes. The revision to the Criminal Code was prepared by a staff of experts drawn from various sources and, after this staff completed its work on that revision, the same staff turned its attention to the revision of the Judicial Code. The only hearings held in the House on either of the revisions were held jointly by a subcommittee of the House Committee on the Judiciary.

Hearings on Revision of Titles 18 and 28 of the United States Code, before Subcommittee No. 1 of the House Committee on the Judiciary, 80th Cong., 1st Sess. (1947). The House Reports issued subsequent to those hearings parallel one another in many respects, including almost identical statements respecting the purpose and scope of the two revisions. Compare H.R. Rep. No. 304, 80th Cong., 1st Sess., 2 (1947), quoted in the text, supra, at 469, with H.R. Rep. No. 308, 80th Cong., 1st Sess., 2 (1947):

Revision, as distinguished from codification, required the substitution of plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections, and consolidation of related provisions.

The Senate Reports on the two revisions likewise expressed the intention of preserving the original meaning of the statutes undergoing revision. Compare S. Rep. No. 1620, 80th Cong., 2d Sess., 1 (1948), quoted in the text, supra, at 469, with S. Rep. No. 1559, 80th Cong., 2d Sess., 2 (1948) ("great care had been exercised to make no changes in the existing law which would not meet with substantially unanimous approval"). Testimony in the House joint hearings confirms that the methods and intent of the revisers themselves were the same with respect to both revisions. Hearings, supra, at 6.

Muniz, 422 U.S. at 471, n.10.

Muniz further detailed the effect of the 1948 Revisions:

This point was clearly made by the law Revision Counsel to the House subcommittee which held joint hearings on the revisions to the Judicial and Criminal Codes:

> There is one thing that I would like to point out . . . and that is the rule of statutory construction.
>
> In the work of revision, principally codification, as we have done here, keeping revisions to a

> minimum, I believe that the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless a clear intent to change the meaning is evidenced.
>
> To find out the intent, I think the courts would go to the report of the committee on the bills and these reports are most comprehensive. We have incorporated in them . . . notes to each section of the bills, both the criminal code and the judicial code.
>
> It is clearly indicated in each of those revisers' notes whether any change was intended so that merely because we have changed the language — we have changed the language to get a uniform style, to avoid awkward expression, to state a thing more concisely and succinctly — but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law.

Hearings on Revision of Titles 18 and 28 of the United States Code before Subcommittee No.1 of the House Committee on the Judiciary, 80th Cong., 1st Sess., 40 (1947)

> This statement is particularly persuasive in view of the fact that its maker, Mr. Zinn, had served as Counsel to the Committee on Revision of the Laws for the previous eight years. The House Report on the revision of the Criminal Code pointed out that Mr. Zinn had, for that Committee, "exercised close and constant supervision" over the work of the revisers who prepared the revision. H.R. Rep No. 304, 80th Cong., 1st Sess., 3 (1947). The nature of the revision process itself requires the courts, including this Court, to give particular force to

> the many express disavowals in the House and Senate Reports of any intent to effect substantive changes in the law.

Muniz, 422 U.S. at 472 n.11.

The *Muniz* Court went on to note:

> To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable. As this Court said in *United States v. Ryder*, 110 U.S. 729, 740 (1884): "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed."
>
> "[N]o changes of law or policy," the Court said, "are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." 353 U.S., at 227. Furthermore, a change in the language of a statute itself was not enough to establish an intent to effect a substantive change, for "every change made in the text is explained in detail in the Revisers' Notes," id., at 226, and the Notes failed to express any substantive change. The Court relied on the Senate and House Reports on the 1948 revision to support this position, id., at 226 nn. 6 and 7; the language quoted by the Court from the House Report is virtually identical to that which appears in the House Report of the 1948 revision of the Criminal Code, see n.9, supra. In view of the express disavowals in the House and Senate Reports on the revisions of both the Criminal Code, see supra, at 468-469, and the Judicial Code, see n.10, supra, it would seem difficult at best to argue that a change in the substantive law could nevertheless be effected by a change in the language of a statute without any indication in the Reviser's Note of that change.

Muniz, 422 U.S. at 471-472.

In *Wingo v. Wedding*, 418 U.S. 461 (1974), the Court noted in relevant part:

> Had any substantive change in the meaning of Rev. Stat. §761, as construed in Holiday v. Johnson, been intended, the Revisers' Notes would have called attention to the change. William W. Barron, the Chief Reviser of the Code, explained: "[No] changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes in clearly expressed. Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.

Wingo, 418 U.S. at 469.

In *Tidewater Oil Co. v. United States, et al.*, 409 U.S. 151 (1971), the Court also addressed the issue:

> However, the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification. Consequently, a well-established principle governing the interpretation of provisions altered in the 1948 revision is that "no change is to be presumed unless clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957).

Tidewater, 409 U.S. at 162-163.

Time and again the Court has looked to the Reviser's Notes as the authoritative source to interpret the meaning of statutes. *See Goldstein v. Cox*, 396 U.S. 471, 477-78 (1970); *Alyeska Pipeline Service Co. v. Wilderness Society, et al.*, 421 U.S. 240, 256-57 (1975); *United States v. National City Lines, Inc., et al.*, 337 U.S. 78, 81-82 (1949); *Stainback v. MonHock Ke Lok Po*, 336 U.S. 368, 376 n.12 (1949); *United States v. John, et al.*, 437 U.S. 634, 648 (1978); *Keene Corporation v. United States*, 508 U.S. 200, 209 (1993); *Newman Green, Inc. v. Alonzo-Larrain*, 490 U.S. 826, 831 n.4. (1989); *Ladner v. United States*, 358 U.S. 169, 177 n.4 (1958); *United States v. Sisson*, 399 U.S. 267, 292 (1970);

Aberdeen and Rockfish Railroad Co., et al. v. SCRAP, et al., 422 U.S. 289, 309 (1975); *McCleskey v. Zant*, 499 U.S. 467, 484 (1991); *Western Pacific Railroad Corp., et al. v. Western Pacific Railroad Co., et al.*, 345 U.S. 247, 255-256 (1953); *Amalgamated Clothing Workers of America, et al. v. Richman Brothers Co.*, 348 U.S. 511, 515 (1955); *United States v. John Hancock Mutual Life Insurance Co.*, 364 U.S. 301, 308-309 (1960); *Finley v. United States*, 409 U.S. 151, 162 (1972); *United States v. Yellow Cab*, 340 U.S. 543, 548 (1951).

In this case, as in *Affronti v. United States*

> The Reviser's Notes were used by Congress as a full explanation of all changes made in the text to existing law. It is unlikely therefore that Congress intended the phrase as it appears in the present section to have a different meaning than the phrase had prior to the revision.

Affronti v. United States, 350 U.S. 79, 82 (1955).

The government brief errs in its argument that "intent to defraud" invariably includes mere obstruction of a governmental function wherever a statute refers to a defrauding of the United States. As the *Cohn* case makes clear such a blanket assertion is not correct. *United States v. Cohn*, 270 U.S. 339 (1926). The holding in *Hammerschmidt*, upon which the government relies so heavily, was interpreting a very broad statute which prohibited defrauding the United States in any manner or for any purpose. *Hammerschmidt v. United States*, 265 U.S. 182 (1924). The breadth of the language of the statute justified the extensive reading *Hammerschmidt* gave to the term "defraud". The history and language of the statute in *Cohn*, however, led this Court to construe "defraud" in that statute in its common law sense requiring the government to prove an intent to deprive of money or property. The precise meaning of "intent to defraud" varies depending upon the text, purpose and history of the particular statute. The absolutist position of the government can find no justification in this Court's precedents.

The Court has construed the predecessor statute of § 545 as uniformly requiring proof of an intent to defraud the government of revenue. In *Dunbar v. United States*, the Court upheld an indictment

under the statute: "An intent to defraud the revenues implies an intent to deprive such revenues of something that is lawfully due them and there can be no such intent without knowledge of the fact that the something is due." *Dunbar v. United States*, 156 U.S. 185, 194 (1895). The indictment in the case carried the direct averment that the defendant "knew that the duties were not fully paid and that he was seeking to bring such goods into the United States without their just contribution to the revenues." *Id.* *Dunbar* noted that the purpose of the statute was the protection of the "revenues of the Untied States" *Id.* In *Keck v. United States*, the Court, in construing the same predecessor statute, held that the smuggling or clandestine introduction of goods referred to in the statute must be without paying or accounting for the duty. *Keck v. United States*, 172 U.S. 434, 445 (1899).

Indeed, this Court has decided a case which appears to have assumed, without explicitly holding, that § 545 requires proof of an intent to cheat the government of duties. In *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972), this Court held that:

> For the Government to secure a conviction under §545 it must prove the physical act of unlawful importation as well as a knowing and willful intent to defraud the United States. An acquittal on the criminal charge may have involved a finding that the physical act was not done with the requisite intent. Indeed the court that tried the criminal charge specifically found that the government had failed to establish intent.

One Lot Emerald, 409 U.S. 232, 233-34. The Court's opinion then quoted the district judge's findings which reasoned that a knowingly false declaration without the intent to deprive the government of revenue was not a violation of the statute:

> The judge at the criminal trial specifically stated:
>
> He is obviously a sophisticated dealer in emeralds and other jewelry.
>
> I don't condone nor do I approve, for one minute what he did in this instance. I think he knew that the jewelry — that ring and those emeralds, should have been declared.

> He made a declaration of some cigarettes and some whiskey, several other little odd, meager items there, but I am not persuaded beyond a reasonable doubt that he did what he did with the intent to defraud the United States.

One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. at 235, n.4.

The government contends that intent to defraud may properly be defined as "an intent to deceive the government (for example, by fraudulently depriving it of useful information in the administration of the customs laws)." (Opp. 7) This Court's decision in *United States v. Yermian*, 468 U.S. 63 (1984) refutes that argument. In discussing the amendments to § 1001, the court cited *United States v. Goodwin*, 566 F.2d 975, 976 (CA5 1978): "Intent to deceive and intent to defraud are not synonymous. Deceive is to cause to believe the false or to mislead. Defraud is to deprive of some right, interest or property by deceit." 468 U.S. 63, 73 n.12. The *Yermian* decision noted:

> The dissent suggests that when Congress eliminated the phrase "with intent to defraud the United States" it really meant only to eliminate the word "defraud" but to retain the element of intent with respect to the United States. See post at 81-82. If that had been the intention of Congress, it simply would have replaced the word "defraud" with the word "deceive" and retained the express intent requirement.

United States v. Yermian, 468 U.S. 63, 73, n.13 (1984).

The government fails to address critical points supporting petitioner's reading of § 545. This Court has held there is a presumption that each term in a criminal statute carries meaning. *Bailey v. United States*, 516 U.S. 137, 145 (1995); *United States v. Wells*, 519 U.S. 482, 495, n.14 (1997). Yet if "intent to defraud" means only "intent to deceive" as argued by the government, it adds nothing to the language of § 545, which prohibits knowingly and willfully making or passing false, forged or fraudulent invoices or other documents. One cannot knowingly pass a false document without intending to deceive. The government's reading of the statute makes the requirement of acting with intent to defraud mere surplusage.

The government ignores the existence of a myriad of other statutes designed to protect its legitimate interest in acquiring information useful in the administration of the customs laws. 18 U.S.C. § 1001, 18 U.S.C. § 542, as well as a score of provisions in Title 19 prohibit the making of false statements in the importation of goods, regardless of any effect on revenue or intent to deprive the government of revenue. It is not necessary to distort the meaning of § 545 to prosecute those who deceive the government in importing goods.

The government fails to address the effect of 18 U.S.C. § 542, which was enacted simultaneously with § 545, and which prohibits the submission of false documents or false statements of any kind, "whether or not the United States shall or may be deprived of any lawful duties." The government's reading of § 545, which could permit a conviction upon the submission of false documents regardless of any intent to cause a deprivation of lawful duties, makes § 542 superfluous. Petitioner submits that § 542 should be construed *in pari materia* with § 545; that they are part of a comprehensive statutory scheme; that they rationally were intended to punish false statements with graduated penalties according to the *mens rea* involved in the particular offense. Section 542 penalizes false statements regardless of whether the government shall or may be deprived of any lawful duties, with a two year maximum. Section 545 penalizes the submission of false statements with intent to defraud, *i.e.* to deprive the government of duties, with a five year maximum. Petitioner construes the statutes in accordance with this Court's rule that

> where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Bates v. United States, 522 U.S. 23, 28 (1997).

The issue in this case has resulted in decisions by four of the circuits. The statute involved was used to prosecute 539 defendants in federal courts from 1995 through 1997 (Bureau of Justice Statistics, Federal Justice Statistics Program). The issue is a recurring one involving a widely used statute. It should be resolved by this Court.

CONCLUSION

For these reasons, as well as those stated in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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